CORPORATE DIVORCE: CONTROL EMOTIONS. THE EFFORT SHOULD BE TO MAXIMIZE REAL VALUE, NOT INFLICT PAIN OR GET EVEN. WHY A NEGOTIATED REMEDY IS OFTEN BEST

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At the beginning of the corporate divorce case, emotions are high and the parties often focus more on lashing out at the other — to get even with or inflict pain on the co-owner – rather than on obtaining an optimal split of the business. It often starts as a scorched earth, all-or-nothing approach where the client's expressed view is often: "The co-owner's entitled to nothing, so prove he's the bad guy and make sure he gets nothing". While there are cases where there is good reason simply to pursue full blown litigation and the all-or-nothing goal, there are many cases where that approach is not the best or even an effective strategy. It is often your task to control your client's emotions and have him or her focus on what really matters.

It is important to have your client understand what the trial judge handling the client's corporate divorce litigation does not know and, therefore, is very unlikely to provide: a judgment that provides your client with the business remnant (s)he really wants and can make value with. Moreover, the increased litigation costs likely resulting from the full litigation approach will have a real impact on the net result achieved. Fee shifting is rarely available. Most cases ultimately settle, so even when fee shifting may be possible, it is rarely the result. Negotiating a result, on the other hand, is more likely to allow your client to obtain what (s)he really wants in the long run and to obtain a net result more favorable than a fully litigated approach can achieve. Although it is likely true that a negotiated result will provide the other party (the "bad guy") more than your client wants the other party to have or thinks (s)he deserves — and it may give the other party more than (s)he truly deserves — that truly misses the point. The goal should be to maximize what your client receives, not minimize what the other side gets. There is no one-to-one correlation to that. Focusing on the wrong thing can be very costly.

A dissolution action, particularly when joined with allegations of fraud, breach of fiduciary duty and the like (which is almost always the case), gets everyone's dander up, puts the focus on past alleged bad acts rather than future business opportunities, increases the fees incurred and the time taken up by the dispute, and forces the trial judge or jury to determine whether the alleged bad acts actually occurred and what damages proximately flowed to your client (not the company your client and the bad guy jointly own) from those bad acts, while generally leading to the liquidation of the business where whatever enterprise value had existed is more often than not lost. Both parties generally lose from this result, regardless of the result of the damage claim, as the business fought over, the golden goose, is no longer laying eggs; both parties need to start fresh to build their businesses or are left with portions of a business which had been generally neglected (to some extent, anyway) during the litigation. Both parties bear the litigation costs Once the emotion has dried up — and that almost always happens at some point — both parties may find themselves very unhappy that, rather than looking for a split which would best benefit each, they looked to harm the other. Both parties may blame their lawyers for allowing them to proceed out of emotion.

Do what you can to control your client's emotions and focus on what really matters.

If you have any questions about such matters, you should contact P. Benjamin Zuckerman on the firm's Dispute Resolution Team.

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